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IN THE

Supreme Court of the United States

October Term, 1965
No. 676

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Appellees.

On Appeal From the Supreme Court of the State of California.

Appellant's Brief in Opposition to Motions to Dismiss or Affirm.

Statement.

This Response is directed to the Motions to Dismiss or Affirm of the Public Utilities Commission of California,[1] and the City of San Rafael, *et al.*

Appellant does not agree with the repeated statements of appellees that the abandonment of the tunnel was motivated and resulted in gain to the appellant's parent Southern Pacific Company. Although this was

[1]The Public Utilities Commission of the State of California is hereafter referred to as California Commission.

the inference and statement of the Interstate Commerce Commission's decision (320 I.C.C. 19), when the matter was presented to a three-judge court, that court specifically refrained from making or approving any such inference or finding (228 F. Supp. 690, 694, 695 (1964), and even said:

> "The question is actually one of degree of profits as opposed to over-all net loss. . . ."

The above cited case, of course, was decided (April 17, 1964) before the disastrous Christmas Week 1964 flood.

The Exclusive Jurisdiction of the District Court.

Appellees argue that the language of Section 1(20) of the Interstate Commerce Act (49 U.S.C. Sec. 1(20)) that "any abandonment contrary to the provisions of this paragraph . . . may be enjoined by any court of competent jurisdiction" does not mean the district court jurisdiction is exclusive. However, what is involved is that the California Commission is attempting to supplement and enforce an order of the Interstate Commerce Commission (that refused to allow or permit abandonment) and exclusive jurisdiction "to enforce" as well as "enjoin" orders of the Interstate Commerce Commission has been placed in the District Court[2] (28 U.S.C. 1336). A careful reading of *Powell v. United States,* 300 U.S. 276, 287-8 (1937) supports this "sole remedy" construction.

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[2]"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." June 25, 1948, c. 646. 62 Stat. 931.

The Disastrous Christmas Week 1964 Flood That Occurred After the Matter Was on Appeal.

Appellees argue that the matter of the disastrous 1964 Christmas Week flood damage to appellant should have first been presented to the California Public Utilities Commission.

The California Commission's decision denying a rehearing was dated October 13, 1964, and a Petition for a Writ of Review was filed with the California Supreme Court on October 29, 1964. All of this occurred long before the Christmas Week 1964 flood.

The general rule is that upon perfecting an appeal, the lower tribunal is divested of jurisdiction of the cause. *3 Calif. Jur. 2d, Appeal and Error, Secs.* 190-191 (pp. 677-681). *4 Am. Jur. 2d, Appeal and Error,* Sec. 352 (pp. 830-832). Thus, the California Commission could not have acted on the matter. In any event, as seen from the response of the California Commission in the Supreme Court of the State of California and here, such would have been a useless act.

The Erroneous Order Requiring Service Based on No Evidence.

The appellees argue that federal questions were not involved in the service matter, but apparently they overlooked both the notices of appeal and the specific language of the second full paragraph of page 8 of the Jurisdictional Statement wherein there was set forth the federal questions in detail, to which reference is made.

What occurred, of course, was that the Presiding Commissioner of the California Commission refused to allow any evidence to be presented on this subject of service [Tr. 21-23], and refused to allow appellant to

show or prove that the service in existence at the time of the tunnel fire was not needed or required [Tr. 21-23, 27, 28, 39-42, 44-45, 45-47, 55]. This improper limiting of the issues [Tr. 18-19, 27] was not only prejudicial error, but resulted in the fact there is no evidence to support the findings, conclusions and orders of the California Commission. The violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and other federal grounds have been appropriately raised.

The appellees argue that appellant should put the former service back on and then see if it is needed. This is no solution, for does this appellant have to waste its funds in performing unneeded service and suffer administrative delay, when it was refused an opportunity to introduce evidence on the subject of service?

The action of the California Commission was directly contrary to the holding of this Court in *St. Louis, etc. R. Co. v. Public Util. Comm'n.*, 279 U.S. 560, 563 (1929) wherein it was said:

> "The past failure of the railway to apply for leave to discontinue the service does not, however, justify exposing it, and its officers and employees, to the severe penalties prescribed by the statute. It may be that, upon full presentation of the facts, the commission would find that to continue the service would subject the carrier to an unreasonable burden; or the carrier may suggest some satisfactory substitute for the specific service now demanded of it. The commission should give to the

railway the opportunity of presenting the facts; and if an application is made promptly, the matter should be determined by the commission without subjecting the railway to any prejudice because of its failure to ask leave before discontinuing the service. Compare Lawrence v. St. Louis-San Francisco R. Co. 278 U. S. 228, ante, 282, 49 Sup. Ct. Rep. 106."

Also, appellant has been denied a hearing on this subject when all evidence was refused and rejected. *Morgan v. United States,* 298 U.S. 468, 480-481 (1936). *Interstate Commerce Commission v. Louisville & NRR,* 227 U.S. 88, 91-92 (1913). *Northern Pacific Ry. v. Department of Public Works,* U.S. 39, 44-45 (1925).

The Record.

On page 23 of the Jurisdictional Statement the following motion to require the California Public Utilities Commission to bring up the portion of the record in its entirety appears:

"If the Supreme Court of the State of California denies the Petition for Rehearing or declines to issue a Writ of Mandate, or does not act on the matter within a reasonable length of time, it is respectfully requested that this Court require and direct the appellee to certify for transmission to this Court the portions of the record in its custody specified in the Notice of Appeal and as required by the Revised Rules of the Supreme Court of the United States (*Re Summers,* 325 U.S. 561, 563 (1945))."

On October 13, 1965, the Supreme Court of the State of California denied (without opinion) the Petition for Rehearing (and declined to issue a Writ of Mandate). Therefore, the above motion is respectfully renewed for the grounds set forth under the subject heading "The Record" in the Jurisdictional Statement.

Conclusion.

The questions presented by this appeal are substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

THORMUND A. MILLER,
JEREMIAH C. WATERMAN,
RANDOLPH KARR,
By RANDOLPH KARR,
Attorneys for Appellant.

END